UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Charlottesville Division

ELIZABETH SINES, SETH WISPELWEY, MARISSA BLAIR, APRIL MUNIZ, MARCUS MARTIN, NATALIE ROMERO, CHELSEA ALVARADO, JOHN DOE, and THOMAS BAKER,

Plaintiffs,

v.

JASON KESSLER, et al.,

Defendants.

Civil Action No. 3:17-cv-00072-NKM

JURY TRIAL DEMANDED

PLAINTIFFS' RESPONSE TO DEFENDANT CANTWELL'S MOTION FOR SERVICE BY THE US MARSHALS SERVICE OF SUBPOENAS TO APPEAR AND TESTIFY UPON DWAYNE DIXON, THOMAS MASSEY, PAUL MINTON, AND LINDSEY MOERS

Defendant Christopher Cantwell moves the Court to direct its clerk to issue trial subpoenas to third-party witnesses Dwayne Dixon, Thomas Massey, Paul Minton, and Lindsey Moers, and to direct service by the U.S. Marshals Service (the "Motion"). ECF No. 1133. Cantwell attaches proposed subpoenas to compel attendance in Charlottesville, Virginia to be served on Mr. Dixon in Durham, North Carolina; on Messrs. Massey and Minton in Philadelphia, Pennsylvania; and on Ms. Moers in Holiday, Florida. *See id*., pp. 3-14. As grounds, Cantwell argues he "is in forma pauperis and these witnesses are dangerous violent felons, convicted or unconvicted . . . ." *Id*., ¶ 3.

The Court should deny the Motion because federal district courts lack authority to compel attendance of out-of-state witnesses beyond 100 miles of the courthouse. Rule 45 sets clear limits

on who may be issued a trial subpoena. For a third-party witness, "[a] subpoena may command a person to attend a trial" only if the witness is either (a) "within 100 miles of where the person resides, is employed, or regularly transacts business in person" or (b) "within the state where the person resides, is employed, or regularly transacts business in person." Fed. R. Civ. P. 45(c)(1) (emphasis added). Absent one of these circumstances, the Court lacks power to issue a subpoena. *In re Guthrie*, 733 F.2d 634, 637 (4th Cir. 1984) ("Thus, a nonparty witness outside the state in which the district court sits, and not within the 100-mile bulge, may not be compelled to attend a hearing or trial . . . .")

There is no legal basis for a party or a district court to disregard these limits on judicial authority, regardless of the party's economic status or the alleged character of the witness. Issuing unauthorized or unenforceable commands to appear in Court would be an abuse of judicial process. *I.d.*, 733 F.2d 634, 637; *see generally U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988) ("the subpoena power of a court cannot be more extensive than its jurisdiction."); *see also Uretek USA, Inc. v. Applied Polymerics, Inc.*, No. 3:11-CV-542, 2011 WL 6029964, at *3 (E.D. Va. Dec. 5, 2011) (in determining whether to transfer venue to the Middle District of North Carolina, noting that third party witnesses resided in Virginia and were not subject to the subpoena power of M.D.N.C.). Indeed, issuing subpoenas that are geographically unenforceable can be an ethical violation. *See, e.g.*, Va. Legal Ethics Opinion 1495 ("[I]t would be improper . . . for a Virginia attorney to request a Virginia court to issue a subpoena duces tecum to obtain documents from an out-of-state individual.").

The proposed subpoenas fall outside the Court's power to issue. It is plain on the face of the subpoenas that all the witnesses reside well beyond the permissible limits of Rule 45 – in North Carolina, Pennsylvania, and Florida – and the Motion lacks any suggestion, let alone evidence,

that any of the witnesses reside, are employed, or regularly transact business in Virginia or within 100 miles of the Court.

Accordingly, the Court lacks authority to issue the subpoenas and should deny the Motion.

Dated: October 12, 2021

Respectfully submitted,

/s/ David E. Mills

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CERTIFICATE OF SERVICE

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